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Evidence--Prohibition of Spousal Testimony in Criminal Trials-- Common Law Rule Upheld

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found the statement to be admissible. In determining whether the accused heard and understood the incriminatory statement, the surrounding circumstances and the ability of the accused to hear the statement are proper matters for the court to consider. Furthermore, every effort should be made to show how near the defendant was to the accuser so that it will clearly appear whether the statement was heard by the defendant. Leaving the question for a jury to decide would be to permit the jury to hear statements which may be highly prejudicial to the accused. Note, 29 N.Y.U.L. REV. 1266, 1279 (1954). It is submitted that there should be a more responsible assumption by the trial judge of the duty to decide preliminary questions of fact, as in the principal case, to determine whether the statement and the accused's conduct in response thereto are admissible in evidence, in order to better protect the accused against a misinterpretation of his silence.

A. G. H.

EVIDENCE—PROHIBITION OF SPOUSAL TESTIMONY IN CRIMINAL TRIALS—COMMON LAW RULE UPHELD.—*D* was convicted under the Mann Act for transporting a girl from Arkansas to Oklahoma for immoral purposes. *D* contended that he took the girl on the trip as an accommodation to her, and not to facilitate her practice of prostitution in Oklahoma. The Mann Act requires immoral purpose as a dominant motive for conviction, so that this defense, if accepted by the jury, would have prevented *D*'s conviction. After *D*'s conviction in the state court, he appealed and assigned as grounds that he was prejudicially affected by the state court allowing his wife to testify as to her prostitution before and after marriage, and as to her prostitution in Oklahoma at the time of the alleged act. *D*'s conviction was upheld by the United States district court and by the court of appeals. On certiorari, United States Supreme Court reversed, refusing to modify the common law rule which forbids one spouse from testifying for or against the other. The court said that, since the factual issue of the case depended upon the purpose of the trip, the testimony of *D*'s wife was prejudicial to him. *Hawkins v. United States*, 79 Sup. Ct. 136 (1958).

The principal case represents the latest attempt to modify one of the most cherished rules of common law, the rule forbidding a wife to testify against her husband in a criminal trial. 8 WIGMORE, EVIDENCE § 2227 (3d ed. 1940). Professor Wigmore and most

statutes codifying the common law indicate that one major qualification of the rule is recognized in cases of "crimes against the other", meaning of course, the other spouse. Such crimes generally contemplate physical acts such as battery, abduction or other physical injuries to the offended spouse but may include testimony as to fraud, adultery or desertion. This qualification does not extend to crimes against the other spouse's property or to crimes against a stranger. 8 WIGMORE, EVIDENCE § 2239.

West Virginia has codified the common rule and forbids one spouse from testifying against the other in a criminal case without the defendant's consent. West Virginia also has the general "crimes against the other" provision qualifying the common law rule. W. VA. CODE ch. 57, art. 3, § 1 (Michie 1955). In view of the West Virginia statute, a case similar to the principal case would probably result in the same decision in West Virginia.

The basic problem in this area is not that of determining what the court will do in cases similar to the principal case. Due to the long standing of the common law rule this inquiry is readily answered. Rather, the problem is that of determining whether the application given the rule by the courts is the proper one. Obviously, this intricate socio-legal question has no perfect answer.

The original reason for the rule was to protect marital harmony by preventing ill feelings which might result from one spouse testifying against the other. In view of the increase in the divorce rate, any rule tending to perpetuate a marriage seems desirable. Some legal scholars contend the rule hampers administration of justice and tends to exclude much evidence from criminal trials. Of course, admission of any evidence leading to an effective administration of justice seems desirable. Choosing between these two arguments would seem to involve a value judgment more dependent on one's personal philosophy than on legal principles. An examination of the latest developments in this area as spelled out by the courts gives a somewhat more satisfactory answer from the legal, if not the philosophical, standpoint.

The *Hawkins* case reaffirmed the common law rule and reversed the defendant's conviction because it felt that admitting his wife's testimony was prejudicial to him. FED. R. CRIM. P. 26, 52 (a). This decision need not preclude modification of the common law rule as the court clearly stated that "reason and experience" could lead to modification thereof.

Attempts to modify the rule seem to be leading to gradual diminution and restriction of the common law rule by two methods. One method is by gradually widening the scope of the "crimes against the other spouse" provision of the rule to include offenses not now contemplated within the statutory language. The Mann Act dispensed with the violence provision for certain federal offenses involving transporting one's wife in interstate commerce for immoral purposes. *Wolfe v. United States*, 291 U.S. 7 (1934). Some states have expanded the "crimes against the other spouse" provision to damage to property of the other spouse. *Emerick v. People*, 110 Colo. 572, 136 P.2d 668 (1943); *In re Kellogg*, 41 Cal. App. 2d 833, 107 P.2d 964 (1940). This at present seems to be the minority view and is contrary to the holdings in most states, including West Virginia. *State v. Clay*, 135 W. Va. 618, 64 S.E.2d 117 (1951); *Meade v. Commonwealth*, 186 Va. 775, 43 S.E.2d 858 (1943). By a second method, other cases have modified the common law rule by allowing a spouse to testify where the crime is against one other than the spouse. *O'Laughlin v. People*, 90 Colo. 368, 10 P.2d 543 (1932). In this case the Colorado court, applying a state statute, admitted the husband's testimony against the wife on a charge that she murdered the husband's child. An extension of this minority view would enlarge the area of criminal cases in which one spouse may testify against the other.

The policy and effectiveness of the common law rule in promoting domestic harmony has been questioned. Some writers seem inclined to have the rule modified to assure admission of any relevant testimony in a criminal case. McCORMICK, EVIDENCE § 90 (1954). How much it is modified, of course, will depend upon statutes, rules and decisions and the supreme court's interpretation of "reason and experience". One suggested modification would reduce the privilege where it might tend to suppress relevant evidence. UNIFORM RULE OF EVIDENCE § 28 (2).

It is evident from the *Hawkins* case that the common rule is still in effect. However, modification of the rule has occurred in a minority of states and has been recommended by way of dictum and in dissenting opinions in both federal and state courts. Therefore, modification of the rule seems an inevitable trend.

J. J. P.